

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

MICHAEL CRISSWELL, individually and on behalf of a class of similarly situated individuals, )  
vs. )  
Plaintiff, )  
vs. )  
MYSPACE, INC., a Delaware corporation, )  
Defendant. )  
FILED  
March 18, 2008 TG  
No. 08cv1578  
Judge SHADUR  
Magistrate Judge SCHENKIER

## **NOTICE OF REMOVAL**

Pursuant to 28 U.S.C. §§ 1331, 1332, 1441, and 1446, as amended in relevant part by the Class Action Fairness Act of 2005 (“CAFA”), Pub. L. 109-2, 119 Stat. 4 (2005), defendant MySpace, Inc. (“MySpace”) hereby removes to the United States District Court, Northern District of Illinois, Eastern Division, the above-styled action, pending as Case No. 08 CH 05929 in the Circuit Court of Cook County, Illinois, Chancery Division (the “State Court Action”). As grounds for removal, MySpace states the following:

## INTRODUCTION

1. On February 15, 2008, plaintiff Michael Crisswell commenced a putative class action against MySpace. A true and correct copy of the Class Action Complaint is attached hereto as Exhibit 1, and cited here as "Compl." In the Class Action Complaint, Plaintiff alleges that MySpace has sent Plaintiff unauthorized text messages and provided no means for Plaintiff to opt out of receiving future text messages. (Compl. ¶¶ 2, 4, 21-23.) Plaintiff alleges, among other claims, that as a result of these text messages, Plaintiff

has been charged a fee of around \$0.15 for the receipt of each text message and has lost all or some of the use of his cell phone. (Compl. ¶¶ 4, 14-15.) Specifically, the Class Action Complaint asserts claims for tortious interference with a contract (Count I), restitution/unjust enrichment (Count II), trespass to chattels (Count III), invasion of privacy (Count IV), computer tampering in violation of 720 ILCS 5/16D-3 (Count V), and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Count VI). (Compl. ¶¶ 32-59.)

#### **BASIS OF JURISDICTION UNDER CAFA**

2. MySpace moves to remove the State Court Action pursuant to the Class Action Fairness Act (“CAFA”), codified under 28 U.S.C. § 1332(d). CAFA provides this Court with original jurisdiction over this action and permits MySpace to remove the State Court Action from the Illinois state court.

3. CAFA vests United States District Courts with original jurisdiction when the aggregate amount in controversy for all class members exceeds \$5,000,000 exclusive of interest and costs and any member of the class of plaintiffs is a citizen of a state different from any defendant. Those requirements are satisfied in this action, as set forth below in more detail and as established by Plaintiff’s Class Action Complaint.

4. Neither the permissive nor mandatory provisions of CAFA for declining original jurisdiction are applicable to this action. Accordingly, as established in more detail below, federal jurisdiction is mandatory under CAFA.

**Original Jurisdiction.**

5. CAFA vests United States District Courts with original jurisdiction as follows:

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which – (A) any member of a class of plaintiffs is a citizen of a State different from any defendant . . . .

28 U.S.C. § 1332(d)(2). Each of these requirements is satisfied in this action.

**Class Actions as Defined by CAFA**

6. The State Court Action is a class action as defined by CAFA. CAFA provides:

[T]he term “class action” means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.

§ 1332(d)(1)(B).

7. Plaintiff filed the State Court Action as a putative class action on behalf of himself, a Class, and a Sub-Class. (Compl. ¶ 24.)

8. The Illinois statute governing the maintenance of class actions, 735 ILCS 5/2-801, is analogous to Federal Rule of Civil Procedure 23.

9. As set forth above, Plaintiff’s Class Action Complaint falls within the definition of a class action under CAFA.

**Citizenship Requirement Under CAFA**

10. CAFA liberalizes the diversity requirements under traditional diversity jurisdiction by providing that CAFA applies when:

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant . . . .

§ 1332(d)(2)(A).

11. Plaintiff is a citizen of Illinois. (Compl. ¶6.)

12. MySpace is a corporation that is organized under the laws of Delaware with its principal place of business in California. (Compl. ¶ 7.)

13. The diversity of citizenship between Plaintiff and MySpace satisfies the diversity requirements of CAFA. Moreover, while Plaintiff's citizenship satisfies the CAFA diversity requirements, CAFA requires only that the citizenship of "any member of a class" be diverse from "any defendant." Because Plaintiff's putative multi-state class attempts to include citizens of numerous states, CAFA diversity jurisdiction is further established.

**Amount in Controversy Requirement under CAFA**

14. CAFA creates original jurisdiction for "any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs." § 1332(d)(2). Unlike traditional amount in controversy review, CAFA requires that the claims of individual class members be aggregated:

In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.

28 U.S.C. § 1332(d)(6).

15. The amount in controversy requirement is met by showing “a reasonable probability that the stakes exceed the minimum.” *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005); *see also Espinosa v. Philip Morris USA, Inc.*, 2007 U.S. Dist. LEXIS 21135, \*\*6-7 (N.D. Ill. 2007) (“Even when applying conservative estimates to the facts alleged in the complaint, the amount in controversy in this case far exceeds the \$5,000,000 threshold for CAFA.”). “Once the proponent of jurisdiction has set out the amount in controversy, only a ‘legal certainty’ that the judgment will be less forecloses jurisdiction.” *Brill* at 448. The amount in controversy as required by CAFA is met for this action as pleaded.

16. This Notice of Removal is based solely on the allegations of the Class Action Complaint. In arguing that the plaintiff has alleged facts sufficient to meet the amount in controversy requirement, MySpace does not admit the facts alleged in Plaintiff’s Class Action Complaint; even if the facts are true, MySpace does not admit that they state a claim; and even if the facts are true and state a claim, MySpace does not admit that there are any damages. *See id.* at 449 (“The demonstration [for a notice of removal] concerns what the plaintiff is claiming (and thus the amount in controversy between the parties), not whether plaintiff is likely to win or be awarded everything he seeks.”).

17. Plaintiff alleges that “due in part to its vast user base (in excess of 100 million users), MySpace has transmitted mass amounts of unauthorized mobile content to the nation’s cellular telephone consumers.” (Compl. ¶ 17.) Plaintiff alleges that the

charge for receiving unauthorized text messages “ranges around \$0.15.” (Compl. ¶ 14.) Without admitting Plaintiff’s allegations, those allegations establish that if each MySpace user received only one unauthorized text message, the amount in controversy for those claims would be in excess of \$15,000,000.00. Plaintiff, however, alleges that his claims are typical of all Class members (Compl. ¶ 25) and that he alone received and was charged for receiving “well over one hundred” text messages from Defendant from October 2007 through December 2007 (Compl. ¶ 21). Plaintiff claims that he and the Class are entitled to “money belonging to Plaintiff and the Class resulting from [MySpace’s] billing and collecting of a significant sum in unauthorized mobile content charges.” (Comp. ¶ 38.)

18. The amount in controversy with respect to the claims made by Plaintiff and the putative class members is thus well in excess of \$5,000,000.<sup>1</sup> The compensatory damages alleged for unauthorized mobile content charges alone satisfy CAFA’s amount in controversy requirement.

19. Aside from charges incurred from unauthorized text messages, Plaintiff also seeks to collect advertising revenue MySpace has received (Comp. ¶ 38), damages for MySpace’s making use of his and the Class’s wireless handsets (Compl. ¶ 42),

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<sup>1</sup> In a strikingly similar Class Action Complaint filed October 22, 2007, in the Northern District of California (San Jose), the same Plaintiffs’ counsel alleged: “This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332. The aggregate claims of plaintiffs and the proposed class members exceed the sum or value of \$5,000,000.” Class Action Complaint at ¶ 8, *Abrams v. Facebook, Inc.*, Case No. 07-cv-05378-JF (Oct. 22, 2007 N.D. Cal.) (emphasis added) (“Facebook Class Action Complaint” or “Facebook Compl.” attached as Exhibit 2). As in the instant case, the Facebook Class Action Complaint includes allegations arising out of alleged unauthorized text messaging. However, Facebook users alleged equal in excess of 34 million (Facebook Compl. at ¶ 21), whereas the instant case involves an allegation of MySpace users in excess of 100 million (Compl. at ¶ 17). Additionally, the Facebook Class Action Complaint alleges the named plaintiff received approximately 20 unauthorized text messages (Facebook Compl. at ¶ 26), whereas the instant Class Action Complaint alleges the named plaintiff received well over 100 unauthorized text messages (Compl. at ¶ 21).

damages for MySpace's intruding on his and the Class's solitude (Compl. ¶ 46), fees obtained while MySpace was allegedly tampering with the handsets and statutory attorney's fees (Compl. ¶ 54), and damages for alleged acts of unfair competition (Compl. ¶ 58).

#### **Discretionary or Mandatory Declining of Jurisdiction**

20. CAFA contains additional provisions under which a District Court may or must decline jurisdiction. § 1332(d)(3) & (4). However, neither of these provisions applies when the defendant is a citizen of a state other than the forum state. Because MySpace is not a citizen of Illinois, neither of these provisions applies to this action.

#### **BASIS OF JURISDICTION UNDER CAN-SPAM ACT**

21. Plaintiff brings a claim for computer tampering in violation of 720 ILCS 5/16D-3 (Count V). Though Plaintiff alleges claims under Section 5/16D-3(a)(4), which covers programs being inserted on computers, if the facts alleged state any claim (which MySpace does not concede), it is a claim under 5/16D-3(b)(4), which covers unsolicited bulk electronic mail. Section 5/16D-3(b)(4) makes no mention of falsity or deception.

22. The federal CAN-SPAM Act "supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto." 15 U.S.C. § 7707(b)(1).

23. Federal courts have ruled that the CAN-SPAM Act preempts state statutes that attempt to regulate the use of electronic mail to send commercial messages without

prohibiting falsity or deception. *See Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 353-56 (4th Cir. 2006) (holding that CAN-SPAM Act preempted an Oklahoma statute regulating electronic mail messages); *Facebook, Inc. v. ConnectU LLC*, 489 F. Supp. 2d 1087, 1094 (N.D. Cal. 2007) (holding that CAN-SPAM Act preempted a California statute regulating electronic mail without requiring falsity or deception as an element); *Gordon v. Virtumundo, Inc.*, 2007 U.S. Dist. LEXIS 35544 \*\*34-40 (D. Wash. 2007) (holding that CAN-SPAM Act preempted Washington's Commercial Electronic Mail Act when plaintiff's claims did not allege any false information); *see also Kleffman v. Vonage Holdings Corp.*, 2007 U.S. Dist. LEXIS 40487 (D. Cal. 2007) (holding that CAN-SPAM Act preempted California statute).

24. The courts in *Omega* and *Gordon* also found that the CAN-SPAM Act preempted consumer protection act claims when the claims' basis was harm alleged under the electronic message claim. *Omega* at 352 n.1; *Gordon* at \*41.

25. Even if a plaintiff pleads only state causes of action, the claims that come within the scope of the federal cause of action necessarily "arise under" federal law for federal question purposes when the federal cause of action has powerful preemptive force. *Ben. Nat'l Bank v. Anderson*, 539 U.S. 1, 7 (2003) (*quoting Franchise Tax Bd.*, 463 U.S. 1, 23-24 (1983)).

26. CAN-SPAM Act preemption is as complete as to unsolicited bulk electronic mail as the Labor Management Relations Act is to collective bargaining, *see id.* at 6 (*citing Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968)), ERISA is to employee disability benefits, *see id.* at 7 (*citing Metropolitan Life Ins. Co. v. Taylor*, 481

U.S. 58 (1987)), the Federal Communications Act is to telephone rate challenges, *see Bastien v. AT&T Wireless Servs.*, 205 F.3d 983, 990 (7th Cir. 2000), the Indian Gaming Regulatory Act is to American Indian gaming, *see Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 547 (8th Cir. 1996), and the Nonintercourse Act is to American Indian land grant rights, *see Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974).

27. Plaintiff's computer tampering and consumer protection claims are completely preempted by the CAN-SPAM Act, give rise to federal question jurisdiction, and should be removed, on this additional, alternative ground.

#### **28 U.S.C. § 1446 REQUIREMENTS**

28. Removal is Timely. A notice of removal may be filed within 30 days after the defendant receives a copy of the initial pleading, motion, or other paper from which it may be ascertained that the case is removable. 28 U.S.C. § 1446(b). Defendant received a copy of the initial pleading when it was served with the Complaint on February 18, 2008. This Notice of Removal is timely filed on or before March 19, 2008.

29. Removal to Proper Court. This Court is part of the "district and division embracing the place where" this action was filed – Cook County, Illinois. 28 U.S.C. §§ 1446(a).

30. Pleadings and Process. Pursuant to 28 U.S.C. § 1446(a), a "copy of all process, pleadings, and orders served upon" Defendant is attached to this Notice of Removal as Exhibit 1. Defendant MySpace has not answered or otherwise filed a response to the Class Action Complaint.

31. Notice to the State Court. A copy of this Notice of Removal is being filed with the Clerk of the Circuit Court of Cook County, Illinois, and is being served on counsel of record, consistent with 28 U.S.C. §§ 1446(a), (d). The Circuit Court of Cook County, Illinois is located within this District.

32. Defendant MySpace hereby reserves all defenses and objections to Plaintiff's Class Action Complaint, including but not limited to: lack of personal jurisdiction, improper venue, *forum non conveniens*, insufficiency of process, insufficiency of service of process, failure to state a claim, and failure to satisfy the requirements for class certification.

WHEREFORE, defendant MySpace, Inc. removes this action to this Court for further proceedings according to law.

Dated: March 18, 2008

Respectfully submitted,  
MYSPACE, INC.

By: /s/ David R. Geerdes  
One of its attorneys

Blaine C. Kimrey (ARDC # 6279625)  
David R. Geerdes (ARDC # 6289557)  
SONNENSCHEIN NATH & ROSENTHAL LLP  
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233 South Wacker Drive  
Chicago, Illinois 60606  
(312) 876-8000

**CERTIFICATE OF SERVICE**

I am an attorney and hereby certify that on March 18, 2008, I caused true copies of the foregoing NOTICE OF REMOVAL to be served by messenger upon the following counsel for Plaintiff:

Myles McGuire  
KAMBEREDELSON, LLC  
53 W. Jackson Blvd.  
Suite 1530  
Chicago, IL 60604

/s/ David R. Geerdes  
David R. Geerdes  
Attorney for defendant MySpace, Inc.

March 18, 2008 TG

08cv1578

Judge SHADUR

Magistrate Judge SCHENKIER

## **EXHIBIT 1**



CORPORATION SERVICE COMPANY®

## Notice of Service of Process

SXY / ALL  
Transmittal Number: 5605999  
Date Processed: 02/18/2008

**Primary Contact:** Tami Fortier-Gomez  
 Fox Entertainment Group, Inc.  
 2121 Avenue Of The Stars  
 Suite 700  
 Los Angeles, CA 90067

<b>Entity:</b>	MySpace, Inc. Entity ID Number 2406469
<b>Entity Served:</b>	Myspace, Inc.
<b>Title of Action:</b>	Michael Crisswell vs. Myspace, Inc.
<b>Document(s) Type:</b>	Summons/Complaint
<b>Nature of Action:</b>	Other
<b>Court:</b>	Cook County Circuit Court, Illinois
<b>Case Number:</b>	08CH05929
<b>Jurisdiction Served:</b>	Delaware
<b>Date Served on CSC:</b>	02/18/2008
<b>Answer or Appearance Due:</b>	30 Days
<b>Originally Served On:</b>	CSC
<b>How Served:</b>	Personal Service
<b>Plaintiff's Attorney:</b>	Myles McGuire 312-589-6370

Information contained on this transmittal form is for record keeping, notification and forwarding the attached document(s). It does not constitute a legal opinion. The recipient is responsible for interpreting the documents and taking appropriate action.

**To avoid potential delay, please do not send your response to CSC**  
*CSC is SAS70 Type II certified for its Litigation Management System.*  
 2711 Centerville Road Wilmington, DE 19808 (888) 690-2882 | [sop@cscinfo.com](mailto:sop@cscinfo.com)

2120 - Served  
 2220 - Not Served  
 2320 - Served By Mail  
 2420 - Served By Publication  
**SUMMONS**

2121 - Served  
 2221 - Not Served  
 2321 - Served By Mail  
 2421 - Served By Publication  
**ALIAS - SUMMONS**

CCG N001-10M-1-07-05 ( )

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**  
**COUNTY DEPARTMENT, CHANCERY** DIVISION

(Name all parties)

Crisswell, Michael

v.

MySpace, Inc.No. 08CH05929**SUMMONS****To each Defendant:**

YOU ARE SUMMONED and required to file an answer to the complaint in this case, a copy of which is hereto attached, or otherwise file your appearance, and pay the required fee, in the Office of the Clerk of this Court at the following location:

- |  |   |   |
|--|---|---|
| <input checked="" type="checkbox"/> Richard J. Daley Center, 50 W. Washington, Room <u>802</u> | <u>802</u> , Chicago, Illinois 60602  |   |
| <input type="checkbox"/> District 2 - Skokie<br>5600 Old Orchard Rd.<br>Skokie, IL 60077       | <input type="checkbox"/> District 3 - Rolling Meadows<br>2121 Euclid<br>Rolling Meadows, IL 60008 | <input type="checkbox"/> District 4 - Maywood<br>1500 Maybrook Ave.<br>Maywood, IL 60153          |
| <input type="checkbox"/> District 5 - Bridgeview<br>10220 S. 76th Ave.<br>Bridgeview, IL 60455 | <input type="checkbox"/> District 6 - Markham<br>16501 S. Kedzie Pkwy.<br>Markham, IL 60426       | <input type="checkbox"/> Child Support<br>28 North Clark St., Room 200<br>Chicago, Illinois 60602 |

You must file within 30 days after service of this Summons; not counting the day of service.

IF YOU FAIL TO DO SO, A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE RELIEF REQUESTED IN THE COMPLAINT.

**To the officer:**

This Summons must be returned by the officer or other person to whom it was given for service, with endorsement of service and fees, if any, immediately after service. If service cannot be made, this Summons shall be returned so endorsed. This Summons may not be served later than 30 days after its date.

Atty. No.: 44146WITNESS, FEB 15 2008,Name: Myles McGuire

Atty. for: Plaintiff

Address: 53 West Jackson Boulevard, Ste. 1530City/State/Zip: Chicago, Illinois 60604Telephone: (312) 589-6370

Service by Facsimile Transmission will be accepted at: \_\_\_\_\_

Date of service 02/15/2008,  
 (To be inserted by officer on copy left with defendant  
 or other person)

(Area Code) (Facsimile Telephone Number)

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT /CHANCERY DIVISION**

Crisswell, Michael

Plaintiff

v.

Case No.

**08CH05929**

MySpace, Inc.

Defendant

**CHANCERY DIVISION CIVIL COVER SHEET**

A Chancery Division Civil Cover Sheet shall be filed with the initial complaint in all actions filed in the Chancery Division. The information contained herein is for Administrative purposes only and shall not be introduced into evidence. Please check the box in front of the appropriate category which best characterizes your action being filed.

005  Administrative Review

006  Change of Name

001  Class Action

002  Declaratory Judgment

004  Injunction

008  Mechanic's Lien

003  Mortgage Foreclosure

007  General Chancery

Accounting

Partition

Arbitration Awards

Quiet Title

Certiorari

Quo Warranto

Dissolution of Corporation

Redemption Rights

Dissolution of Partnership

Reformation of a Contract

Equitable Lien

Rescission of a Contract

Interpleader

Specific Performance

Mandamus

Trust Construction

Ne Exeat

Other \_\_\_\_\_

By:

Atty. No.: 44146

Attorney

Pro Se

Name: KamberEdelson, LLC

Atty. for: Plaintiff

Address: 53 West Jackson Boulevard, Ste. 1530

City/State/Zip: Chicago, Illinois 60604

Telephone: (312) 589-6370

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION**

MICHAEL CRISSWELL, individually and on )  
behalf of a class of similarly situated individuals, )  
Plaintiff, )  
v. )  
MYSPACE, INC., a Delaware corporation, )  
Defendant. )

No. 08CH05929

**Jury Trial Demanded**

X

**CLASS ACTION COMPLAINT**

Plaintiff Michael Crisswell brings this class action complaint against Defendant MySpace, Inc. ("MySpace") to stop defendant's practice of transmitting unauthorized text messages to the wireless devices of consumers nationwide, and to obtain redress for all persons injured by its conduct. Plaintiff, for his class action complaint, alleges as follows upon personal knowledge as to himself and his own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by his attorneys.

**NATURE OF THE CASE**

1. In an on-going effort to attract users to its website, MySpace, a social networking company that has gained popularity by linking students and other groups through its website, engaged in a mobile marketing service. Through this service, members can, with a few clicks of the computer mouse, have MySpace send text messages to the cellular telephones of virtually any person, irrespective of whether such person has consented to receive such text messages.
2. Through intentional design or gross negligence, MySpace's system has a significant flaw: the system sends text messages to the cell phone numbers entered by a

particular member, without regard to whether the recipient wants to receive the text messages. Further, because MySpace refuses to tell recipients how to opt-out of receiving future text messages, MySpace's system has become a safe haven for spammers.

3. MySpace's system has created a number of significant problems. First, individuals' privacy rights are being compromised. Cell phone users are now being bombarded with invitations to parties by people they do not know, requests to be designated a "friend" on MySpace's website, and other often obscure, graphic and adult-oriented messages. These text messages come during all times of the day or night and because the senders are often hard to identify, can be seen as intimidating, unsettling and even threatening.

4. Additionally, recipients of these text messages invariably pay to receive these text messages, even though they are completely unauthorized and unwelcome.

5. In order to redress these injuries, Plaintiff brings suit seeking, *inter alia*, monetary damages and injunctive relief.

## **PARTIES**

6. Plaintiff Michael Crisswell is a citizen of Illinois.

7. Defendant MySpace, Inc. is an online social networking company that distributes "mobile content," such as user-generated blog entries, friend requests, news and other data (collectively, "content") to cellular telephones. MySpace is a Delaware corporation with its headquarters and principal place of business in California. It does business throughout the country and this County.

## **VENUE**

8. Venue is proper in Cook County because Defendant does business in Cook County.

**CONDUCT COMPLAINED OF**

9. In recent years, as social-networking has grown increasingly popular on the internet, many companies in the industry have released mobile versions of their service ("Mobile Service") which involve the transmission of user-created content in the form of text messages to fellow users and others exclusively through their cellular telephones.

10. In or about 2006, Defendant MySpace developed such a system it called MySpace Mobile.

11. Defendant's Mobile Service employs technology known as Short Message Services ("SMS"), which is a content delivery system that allows owners of wireless devices, such as cellular telephones, to send and receive short text messages, usually limited to 160 or so characters.

12. Defendant's Mobile Service works primarily by converting messages posted by users on the MySpace website into commercial SMS text messages which MySpace then automatically transmits to cellular telephones. In so doing, MySpace exercise controls over the text messages by, inter alia, changing both their format and content before transmission.

13. In order to obtain the necessary technical expertise and billing relationships required to operate its Mobile Service, MySpace, by itself or through its agents such as m-Qube, Inc., partnered with traditional cellular telephone carriers.

14. MySpace and/or its partners profit from the Mobile Service by charging the recipient a fee for the transmission of each item of mobile content. Such fee varies in amounts but ranges around \$0.15 that the recipient must pay for the receipt of each text message sent by MySpace. Recipients are charged such fees even if they did not consent to receive such text messages. Defendant and its partners levy additional fees for mobile content that appear on consumers' cellular telephone bills as separate line item charges. Many of these charges are similarly unauthorized.

15. In addition to such fees, MySpace's text message content causes wireless devices to slow down, takes up bandwidth over a wireless connection, uses up the memory of the device, and frustrates cell phone users. The unauthorized spam decrease productivity by requiring that hours be spent on figuring out how to stop the content from being placed on one's wireless device and how to get the content off one's cell phone. The cumulative impact of not only multiple unwanted text messages, but also the threat of their continued receipt, impedes the use of wireless devices.

16. MySpace provides no safeguard to ensure that recipients are not receiving and paying for text messages they did not authorize.

17. As a consequence, due in part to its vast user base (in excess of 100 million users), MySpace has transmitted mass amounts of unauthorized mobile content to the nation's cellular telephone consumers since instituting its Mobile Service.

18. If MySpace wanted to protect the public from receiving unauthorized text messages, it could do so in an instant by, for example, ensuring that each text message effectively identifies the member associated with such message and by providing a clear and conspicuous manner for recipients to opt-out of receiving future text messages.

### **THE FACTS RELATING TO THE NAMED PLAINTIFF**

19. In or about 2003, Plaintiff purchased new cell phone service for his personal use from an established cellular telephone carrier and partner in Defendant's mobile service.

20. On that same day, in exchange for a cellular telephone service plan, Plaintiff agreed to pay a monthly fee for a period of approximately 12 months.

21. Beginning on or about October 2007 and continuing through about December 2007, Plaintiff's cell phone account was charged repeatedly for receiving well over one hundred

text messages from Defendant. For instance, on or about December 2007, Plaintiff received such mobile content in the form of the following text messages from Defendant:

“MSG: MySpace friend request  
I aint doing this shit for no stand n [sic] ovation  
would like to be added as one of your friends!”

“MSG: MySpace Message  
Reggie Dub present amatuer night at da soft touch!”

22. At no time did Plaintiff consent to Defendant's sending of text messages to his cellular telephone.

23. Despite repeated attempts over several weeks that consumed dozens of man-hours, Plaintiff was unable to find any clear way to opt-out of receiving future text messages from Defendant.

### **CLASS ALLEGATIONS**

24. Plaintiff brings this action on behalf of himself and a class (“Class”) and Sub-Class, defined as follows:

(A) A Class (“Class”) consisting of all wireless telephone subscribers in the nation who suffered losses or damages as a result of incurring charges on their cellular telephone bills from or on behalf of Defendant MySpace not authorized by the subscriber; provided, however, that the following are excluded from this proposed Class: (i) the Defendant, and (ii) any employee of a defendant.

(B) A Sub-Class (“Sub-Class”) consisting of all members of the Class residing in the State of Illinois.

25. The claims of Plaintiff are typical of the claims of all of the other members of the Class and Sub-Class.

26. Plaintiff will fairly and adequately represent and protect the interests of the other members of the classes. Plaintiff has retained counsel with substantial experience in prosecuting complex litigation and class actions. Plaintiff and his counsel are committed to vigorously prosecuting this action on behalf of the other members of the classes, and have the financial resources to do so. Neither Plaintiff nor his counsel has any interest adverse to those of the other members of the classes.

27. Absent a class action, most members of the classes would find the cost of litigating their claims to be prohibitive, and will have no effective remedy. The class treatment of common questions of law and fact is also superior to multiple individual actions or piecemeal litigation in that it conserves the resources of the courts and the litigants, and promotes consistency and efficiency of adjudication.

28. Defendant has acted and failed to act on grounds generally applicable to the plaintiff and the other members of the classes, requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the members of the classes.

29. The factual and legal bases of Defendant's liability to Plaintiff and to the other members of the classes are the same, resulting in injury to the Plaintiff and to all of the other members of the classes. Plaintiff and the other members of the classes have all suffered harm and damages as a result of Defendant's unlawful and wrongful conduct.

30. There are many questions of law and fact common to the claims of Plaintiff and the other members of the classes, and those questions predominate over any questions that may affect individual members of the classes. Common questions for the Class include but are not limited to the following:

(a) Whether Defendant tortiously interfered with contracts between Plaintiff and the Class, on the one hand, and their wireless carriers, on the other hand, by causing them to be charged for products and services by their carrier that were unauthorized.

(b) Whether Defendant has unjustly received money belonging to Plaintiff and the Class and whether under principles of equity and good conscience, Defendant should not be permitted to retain it;

(c) Whether MySpace transmission of unauthorized content to the wireless devices of Plaintiff and the Class amounts to trespass to chattels;

(d) Whether Defendant's transmission of unauthorized content to the wireless devices of Plaintiff and the Class amounts to invasion of privacy.

31. Common questions for the Sub-Class include:

(a) Whether MySpace's conduct described herein is computer tampering in Violation of 720 ILCS 5/16D-3;

(b) Whether MySpace's conduct described herein violates the Illinois Consumer Fraud and Deceptive Business Practices Act.

**COUNT I**  
**(Tortious Interference with a Contract on behalf of the Class)**

32. Plaintiff incorporates by reference the foregoing allegations.

33. Plaintiff and the Class had contractual relationships with their wireless carriers whereby they agreed to pay a certain sum of money in exchange for activation of their cellular telephone accounts and their carriers' promise to provide various communication and related services to Plaintiff and the Class and to bill Plaintiff and the Class only for products or services the purchase of which they had authorized.

34. Defendant knew of said contractual relationships and intended to and did induce a breach or disruption of the contractual relationships.

35. Defendant intentionally interfered with said contractual relationships through improper motives and/or means by knowingly and/or recklessly continually causing to be placed on the cellular telephone bills of cellular telephone owners across the nation unauthorized charges.

36. Plaintiff and the Class suffered loss as a direct result of the conduct of Defendant.

**COUNT II**  
**(Restitution/Unjust Enrichment on behalf of the Class)**

37. Plaintiff incorporates by reference the foregoing allegations.

38. A benefit has been conferred upon Defendant by Plaintiff and the Class.

Defendant has received and retains money belonging to Plaintiff and the Class resulting from its billing and collecting of a significant sum in unauthorized mobile content charges, advertising revenue and related earnings.

39. Defendant appreciates or has knowledge of said benefit.

40. Under principles of equity and good conscience, Defendant should not be permitted to retain the money belonging to Plaintiff and the Class which it has unjustly received as a result of its actions.

**COUNT III**  
**(Trespass to Chattels on behalf of the Class)**

41. Plaintiff incorporates by reference the foregoing allegations.

42. At all relevant times, Defendant and/or its agents intentionally and without consent, gained access to Plaintiff's wireless handset and the handsets of the class, used Plaintiff's wireless handset and the handsets of the class, occupied memory of these handsets,

and/or dispossessed Plaintiff and the members of class of unencumbered access to their wireless handsets.

43. In so doing, Defendant intentionally intermeddled with, damaged, and deprived Plaintiff and the class of their wireless handsets, or a portion thereof.

**COUNT IV**  
**(Invasion of Privacy on behalf of the Class)**

44. Plaintiff incorporates by reference the foregoing allegations.

45. Wireless handsets provide users with apparent seclusion, solitude and privacy.

46. MySpace intentionally intruded upon the solitude and seclusion of Plaintiff and the class by invading the privacy of wireless handset use through its transmission of unauthorized mobile content to such handsets.

47. The invasion by MySpace would be highly offensive to a reasonable person and damaged Plaintiff and the members of class.

48. Likewise, by causing charges based on unauthorized products and services, MySpace wrongfully appropriated Plaintiff's and the members of class's personality for commercial use.

**COUNT V**  
**(Computer Tampering in Violation of 720 ILCS 5/16D-3 on behalf of the Sub-Class)**

49. Plaintiff incorporates by reference the foregoing allegations.

50. The cellular phones owned by Plaintiff and the other class members are sophisticated electronic devices which accept, process, store, retrieve and output data, and contain many (if not most) of the same capabilities and equipment as traditional desktop

computers (in addition to cellular radio signal processing technology). These cellular phones are computers under the definition of 720 ILCS 5/16D-2(a).

51. Likewise, the mobile content alleged in this Complaint is a program under the definition of 720 ILCS 5/16D-2(b); a series of coded instructions or statements accepted by class members' cellular phones, which cause the computer to process data and supply the results of the data processing (by, inter alia, displaying the mobile content).

52. Plaintiff and the other class members' cellular service will be terminated unless they pay additional fees for the receipt of the unauthorized mobile content, whether they authorized that mobile content or not. Through the conduct alleged above, Defendant violates 720 ILCS 5/16D-3(a)(4) by knowingly participating in and/or facilitating the insertion of mobile content into class members' cellular phones without the permission of the cellular phones' respective owners, knowing and/or having reason to believe that the insertion of the unauthorized mobile content will or may cause loss to the users of that cellular phone.

53. Plaintiff and the other class members are damaged by those violations. Defendant's violations of 720 ILCS 5/16D-3(a)(4) cause the Plaintiffs and the other class members to pay charges for mobile content services to which they did not consent. Defendant's violations of 720 ILCS 5/16D-3(a)(4) further damage Plaintiffs and other class members by causing them to pay falsely inflated cellular telephone bills to their cellular telephone carriers, as well as the lost time required to sort, read, discard and attempt to prevent future charges for unwanted mobile content services, and lost storage space, connectivity, and computing resources on the cellular phones.

54. Plaintiff, on his own behalf and behalf of the other class members, seeks appropriate relief (including damages in an amount to be determined at trial, and injunctive relief

or other equitable relief, such as an accounting, and disgorgement of fees obtained while these violations were ongoing), as well as reasonable attorney's fees and other litigation expenses, against Defendant under 720 ILCS 5/16D-3(c).

**COUNT V**  
**(Violations of the Illinois Consumer Fraud and Deceptive Business Practices Act on Behalf of the Sub-Class)**

55. Plaintiff incorporates by reference the foregoing allegations.

56. Section 2 of the Illinois Consumer Fraud and Deceptive Business Practices Act ("CFA") declares unlawful "any [u]nfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of such material fact . . . in the conduct of any trade or commerce . . . whether any person has in fact been misled, deceived or damaged thereby."

57. Defendant violated, and continues to violate this proscription through its conduct alleged above, as set forth above.

58. Defendant, through its acts of unfair competition, has obtained money from Plaintiff and members of the proposed class. Plaintiff and the members of the class asked that this Court restore this money to Plaintiff and enjoin Defendant from continuing its illegal practices.

59. Such conduct is ongoing and continues to this date. Plaintiff, the class members and the general public are therefore entitled to the relief described herein.

WHEREFORE, Plaintiff Michael Crisswell, on behalf of himself, the Class and Sub-Class, prays for the following relief:

- a. Certify this case as a class action on behalf of the Classes as defined above and appoint Michael Crisswell Class Representative, and appoint, KamberEdelson, LLC as lead counsel;
- b. Enter judgment against MySpace for all economic, monetary, actual, consequential, and compensatory damages caused by its conduct, and if its conduct is proved willful, award Plaintiff and the Class exemplary damages;
- c. Enter judgment against MySpace for all economic, monetary, actual, consequential, and compensatory damages caused by its conduct;
- d. Award Plaintiff and the Classes reasonable costs and attorneys' fees;
- e. Award Plaintiff and the Classes pre- and post-judgment interest;
- f. Enter judgment for injunctive, statutory and/or declaratory relief as is necessary to protect the interests of Plaintiff and the Classes; and
- g. Award such other and further relief as equity and justice may require.

**JURY DEMAND**

Plaintiff requests trial by jury of all claims that can be so tried.

February 15, 2008

Michael Crisswell, individually and on behalf of a  
class of similarly situated individuals

  
One of his attorneys

Jay Edelson  
Myles McGuire  
Steven Lezell  
KAMBEREDELSON, LLC  
53 West Jackson Boulevard  
Suite 1530  
Chicago, Illinois 60604  
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Firm ID: 44146

March 18, 2008 TG

08cv1578

Judge SHADUR

Magistrate Judge SCHENKIER

## **EXHIBIT 2**

1 ALAN HIMMELFARB (State Bar # 90480)  
2 KAMBEREDELSON, LLC  
3 2757 Leonis Boulevard  
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JAY EDELSON (pro hac vice pending)  
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8 Chicago, Illinois 60604  
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9

10 ATTORNEYS FOR PLAINTIFF

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION**

14 LINDSEY ABRAMS, individually and on  
behalf of a class of similarly situated  
15 individuals.

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation,

**Defendant.**

) Case No. 07-03  
)  
)  
**) COMPLAINT FOR DAMAGES**  
)  
**) AND INJUNCTIVE RELIEF**  
)  
)  
**) DEMAND FOR JURY TRIAL**  
)  
)  
**) CLASS ACTION**  
)  
)  
)  
)  
)  
)  
)

**BY FAX**

## **CLASS ACTION COMPLAINT**

Plaintiff Lindsey Abrams brings this class action complaint against defendant Facebook, Inc. (“Facebook”) to stop defendant’s practice of transmitting or permitting to be transmitted unauthorized text messages to the wireless devices of consumers nationwide, and to obtain redress for all persons injured by its conduct. For her class action complaint,

## **COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF**

1 Plaintiff alleges as follows upon personal knowledge as to herself and her own acts and  
 2 experiences, and, as to all other matters, upon information and belief, including investigation  
 3 conducted by her attorneys.

4 **NATURE OF THE CASE**

5       1. In an on-going effort to attract users to its website, Facebook, a self-described  
 6 “social utility” that has gained popularity by linking students and other groups through its  
 7 website, engaged in a mobile marketing service called “Facebook Mobile.” Through  
 8 Facebook Mobile, members can, with a few clicks of the computer mouse, send text  
 9 messages – often containing adult content -- to the mobile phone numbers associated with  
 10 other members.

11      2. However, through either intentional design or gross negligence, Facebook’s  
 12 system has a significant flaw: the system sends text messages to the cell phone numbers  
 13 entered by a particular member, without regard to whether that member actually still uses  
 14 that cell phone number. Because cell phone numbers are reassigned to new users after the  
 15 previous user closes her or her account, Facebook’s flaw has resulted in the transmission of  
 16 thousands of unauthorized text messages to the wireless phones of consumers across the  
 17 nation.

18      3. Facebook’s system has created a number of significant problems. First,  
 19 individuals’ privacy rights are being compromised. New cell phone users are now being  
 20 assailed with invitations to parties by people they do not know, requests to be designated a  
 21 “friend” on Facebook’s website, and other often obscure and graphic messages. These  
 22 messages can come during all times of the day or night and, because the senders are often  
 23 hard to identify, can be seen as intimidating or unsettling.

24      4. This issue is all the more pronounced because children are among those who  
 25 receive phone numbers previously associated with Facebook’s members. As such, adults  
 26  
 27  
 28

1 seeking sexual encounters or other types of adult activities end up inadvertently text  
2 messaging young children.

3       5.     Additionally, recipients of these text messages often have to pay to receive  
4 these text messages, even though they are completely unauthorized and unwelcome.  
5 In order to redress these injuries, Abrams, on behalf of herself and a nationwide class, brings  
6 suit under the California Computer Crime Law, Cal. Pen. Code § 502, California’s Unfair  
7 Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200, and the common law and seeks  
8 an immediate injunction against Facebook.

## PARTIES

10           6. Plaintiff Lindsey Abrams is a mother of a young child. She is a citizen of  
11 Indiana.

12       7.     Defendant Facebook, Inc. is a self-described social networking company  
13 located in California. It is a Delaware company with its principal place of business in  
14 California, and it conducts business throughout the United States.

## **JURISDICTION**

## **VENUE AND JURISDICTION**

17       8.     This Court has subject matter jurisdiction over this action pursuant to 28  
18 U.S.C. § 1332. The aggregate claims of plaintiffs and the proposed class members exceed  
the sum or value of \$5,000,000.00.

19       9. This Court also has personal jurisdiction over defendants because (a) a  
20 substantial portion of the wrongdoing alleged in this complaint took place in this state, (b)  
21 defendant Facebook Inc.'s principle place of business is located in this state, and (c)  
22 defendant is authorized to do business here, has sufficient minimum contacts with this state,  
23 and/or otherwise intentionally avails itself of the markets in this state through the promotion,  
24 marketing and sale of its products in this state, to render the exercise of jurisdiction by this  
25 Court permissible under traditional notions of fair play and substantial justice.

26           10.     Venue is proper in this District under 28 U.S.C. §1391(b) and (c). A  
27 substantial portion of the events and conduct giving rise to the violations of law complained

1 of herein occurred in this District, defendant Facebook Inc.'s principle executive offices and  
2 headquarters are located in this District at 156 University Avenue, Palo Alto, CA 94301.

3 **INTRADISTRICT ASSIGNMENT**

4 11. Intra district assignment to the San Jose Division is proper because the  
principal offices of defendant Facebook Inc, is located in Santa Clara County.

5 **THE CONDUCT COMPLAINED OF**

6 12. In recent years, as social-networking has grown increasingly popular on the  
internet, many companies in the social-networking industry have released mobile versions of  
9 their service ("Mobile Service") which involve the transmission of user-created content in the  
form of text messages to fellow users exclusively through their wireless devices.

10 13. In or about April 2006, Defendant Facebook and its partner cellular telephone  
carriers ("carriers") jointly released a "Mobile Service" for Facebook's users called  
Facebook Mobile.

11 14. Defendant's Mobile Service employs technology known as Short Message  
Services ("SMS"), which is a content delivery system that allows owners of wireless devices,  
such as cell phones, to send and receive short text messages, usually limited to 160 or so  
16 characters.

17 15. Defendant's Mobile Service works primarily by converting messages posted  
by users on the Facebook website into commercial SMS text messages which are then  
automatically transmitted to the wireless devices of other Facebook users.

18 16. In order to obtain the necessary technical expertise and billing relationships  
required to operate its Mobile Service, Facebook, by itself or through its agents, partnered  
with traditional cellular telephone carriers.

19 17. Facebook and/or its partners profit from the Mobile Service by charging the  
recipient a fee for the transmission of each item of wireless content. Such fee varies in  
25 amounts but ranges around \$0.15 that the recipient must pay for the receipt of each text

1 message sent by Facebook. Recipients are charged such fee even if they did not consent to  
 2 receive such text messages.

3       18. As a part of their normal business practice, Facebook's carrier partners  
 4 routinely reissue (or "recycle") wireless phone numbers assigned to the wireless devices of  
 5 former customers to new customers who open new cellular telephone accounts. Because it  
 6 and its partners would lose valuable revenue, Facebook has knowingly permitted its system  
 7 to operate in a way so as to ensure that unauthorized content is transmitted to the wireless  
 8 devices of consumers who have received a wireless device encumbered with Facebook  
 9 Mobile.

10      19. The instant lawsuit flows from what happens when Facebook cooperates with  
 11 its wireless carrier partners when a wireless number of a Facebook user is recycled to a non-  
 12 Facebook user, resulting in Facebook's transmission of unauthorized content to the wireless  
 13 devices of consumers nationwide.

14      20. Wireless phone number recycling is a serious problem that is not limited to a  
 15 small group of customers. Indeed, it has been a well known and recurring problem that  
 16 companies at all levels within the wireless industry have conveniently ignored to their benefit  
 17 for several years. According to publicly available information from the Federal  
 18 Communications Commission, millions of cell phone numbers were recycled in 2006 alone.

19      21. As a consequence, due in part to its vast user base (in excess of 34 million),  
 20 Facebook has transmitted mass amounts of unauthorized content to the nation's cellular  
 21 telephone consumers since instituting its Mobile Service in 2006.

22      22. If Facebook wanted this practice to stop, it could do so immediately by  
 23 instituting a regular communication policy with its carrier partners to ensure that the wireless  
 24 numbers Facebook has on file for its users stay current and have not been recycled by its  
 25 carrier partners to a new cellular telephone consumer who has not consented to receive  
 26 Facebook content.

1       23. On information and belief, Facebook transmits tens of thousands, if not  
2 hundreds of thousands, of text messages to consumers' wireless devices throughout the  
3 nation every day.

4           24. Beginning in or about April, 2006, and continuing through to the present,  
5 Facebook and/or its authorized partners, agents, vendors, or contractors, knowingly and  
6 intentionally accessed and charged the wireless devices of consumers nationwide without  
7 authorization, including the repeated delivery of and charging for unauthorized content to the  
8 cellular telephone owned by Plaintiff.

9       25. On or about November 26, 2006, Plaintiff Lindsey Abrams opened a new  
10 wireless telephone account with Verizon Wireless, a Facebook Mobile carrier partner. At that  
11 time, Plaintiff was assigned wireless phone number which, it was later determined, was  
12 encumbered with Facebook's Mobile Service.

13       26. Beginning shortly after opening her cell phone account and continuing  
14 through February 2007, Plaintiff's cell phone received approximately 20 unauthorized text  
15 messages from Facebook.

16        27. The “from” field of such transmissions contained only the following cryptic  
17 term: “32665,” which was later confirmed to belong to Facebook’s Mobile Service. The  
18 bodies of a sampling of those text messages read as follows:

- a. "Jacob [last name redacted] (Purdue) wrote on your wall: Hey not much , , just the same ol SH\*\* [expletive redacted in part] yeah you haven't poked me in a whole! lol . . . what are you up to?"
  - b. "Lauren [last name redacted] wrote on your wall: well i see, u want to teach me? Reply to msg Lauren back."
  - c. "Zeph [last name redacted] has requested to add you as a friend. Reply 'a' to add, or 'info' to get profile."

1                   d. "Facebook msg from Damon [last name redacted] (Indianapolis, IN) Subj; re:  
 2                   hey hey you..well just haven't talked to u in like awhile...thought i'd drop in  
 3                   a...('n' for next)"  
 4                   28. At no time did Plaintiff consent to receive such text messages from Facebook.  
 5                   29. Plaintiff's cellular service provider, Verizon Wireless, a partner in  
 6 Defendant's Mobile Service, charged Abrams \$0.10 for each such Facebook transmission,  
 7 causing her wireless phone account to slip into arrears, thereby requiring Plaintiff to deposit  
 8 additional funds with Verizon Wireless in order to prevent deactivation of her cell phone  
 9 service. When Plaintiff asked a Verizon representative how she could stop the receipt of such  
 10 Facebook transmissions, Verizon informed Plaintiff that her only option was to deactivate all  
 11 text message functionality on her phone. Because Plaintiff did not want to lose the ability to  
 12 send and receive text messages that she authorized, she declined to discontinue such part of  
 13 her cell phone service.

14                   30. Facebook knowingly accessed and obtained information from Plaintiff's  
 15 wireless device through its transmission of such unauthorized content.

16                   31. Upon information and belief, the unauthorized content transmitted to  
 17 Plaintiff's wireless device was one of thousands delivered to the wireless devices of persons  
 18 around the United States, in the same fashion and by the same means as those received by  
 19 Plaintiff.

#### 20                   **Damage Caused by Defendant's Unlawful Conduct**

21                   32. In addition to the fees discussed above and other related fees assessed by  
 22 carriers, Facebook's text message content causes wireless devices to slow down, takes up  
 23 bandwidth over a wireless connection, uses up the memory of the device, and frustrates cell  
 24 phone users. The unauthorized text messages decrease productivity by requiring that hours be  
 25 spent on figuring out how to stop the content from being placed on one's wireless device and  
 26 how to get the content off one's cell phone. The cumulative impact of not only multiple  
 27  
 28

unwanted text messages, but also the threat of their continued receipt, impedes the use of wireless devices.

3       33. More significantly, Facebook's misconduct invades the privacy rights of  
4 potentially hundreds of thousands of people. Such persons are receiving unwanted text  
5 messages at all times of the day and night. As experienced by Ms. Abrams, these text  
6 messages can contain adult or graphic language or requests for intimate encounters.

7       34. This problem is all the more serious because, as Facebook knows, many of the  
8 recipients of these graphic text messages are young children. Receiving solicitations to  
9 "teach me," reminders that the sender has not been "poked" in awhile, invitations to college  
10 parties, or requests to be added to the sender's list of "friends," can be both frightening and  
11 dangerous.

## **CLASS ALLEGATIONS**

- a. All persons or entities residing in the United States who, at any time since April 2006, received a text message on their mobile telephone through Facebook Mobile, who did not authorize Facebook Mobile to send messages to their telephone number.

Excluded from the class are defendant, any entity in which defendant has a controlling interest or which has a controlling interest in defendant, and defendant's legal representatives, predecessors, successors, assigns, and employees. Also excluded from the class are the judge and staff to whom this case is assigned, and any member of the judge's immediate family.

25       36. Plaintiff reserves the right to revise this definition of the class based on facts  
26       she learns during discovery.

37. Plaintiff is a member of the class that she seeks to represent. Members of the

class can be identified using defendant's records of Facebook Mobile services and other information that is kept by defendant in the usual course of business and/or in the control of defendant. Class members can also be notified of the class action through publication and direct mailings to address lists maintained in the usual course of business by defendant.

38. **Numerosity:** Class members are so numerous that their individual joinder is impracticable. It is estimated that the Class consists of thousands of members. The precise number of class members is unknown to plaintiff, but it is clear that the number greatly exceeds the number to make joinder impossible.

39. **Existence and predominance of common questions:** Common questions of law and fact predominate over the questions affecting only individual class members. Some of the common legal and factual questions include:

- a. Whether defendant profits from Facebook Mobile messages sent to mobile telephones;
  - b. Whether defendant knew or should have known that the Facebook Mobile messages were being sent to mobile telephone users who had not authorized such messages;
  - c. Whether Defendant's conduct described herein violates Cal. Pen. Code § 502(c)(3), California's Computer Crime Law.
  - d. Whether Defendant has unjustly received money belonging to Plaintiff and the Class and whether under principles of equity and good conscience, it should not be permitted to retain it;
  - e. Whether Defendant's conduct described herein amounted to trespass to chattels on behalf of Plaintiff and the Class;
  - f. Whether Defendant's conduct described herein violates California Cal. Bus. & Prof. Code § 17200, California's Unfair Competition Law; and

g. The nature and extent of damages and other remedies to which the conduct of defendant entitles the class members.

3       40. Defendant engaged in a common course of conduct giving rise to the legal  
4 rights sought to be enforced by the class members. Similar or identical statutory and  
5 common law violations, business practices, and injuries are involved. Individual questions, if  
6 any, pale by comparison to the numerous common questions that dominate.

7       41. The injuries sustained by the class members flow, in each instance, from a  
8 common nucleus of operative facts. In each case defendant caused or permitted unauthorized  
9 text messages to be delivered to the telephone of a user who did not authorize receipt of such  
services.

42. The class members have been damaged by defendant's' misconduct. Class members must pay for receipt of text messages, even messages they do not want.

43. **Typicality:** Plaintiff's claims are typical of the claims of the other proposed  
class members. Plaintiff obtained a telephone capable receiving text messages. Plaintiff  
released her telephone number to those persons to whom she provided authorization to send  
her text messages. She did not authorize Facebook Mobile to send, either from itself or from  
its members, any text messages to her telephone. To the extent that text messages were  
received on her telephone by Facebook and/or any of its members via its Facebook Mobile  
service, such messages were unauthorized, and a violation of the rights of plaintiff.

44. **Adequacy:** Plaintiff will fairly and adequately protect the interests of the class. Plaintiff is familiar with the basic facts that form the bases of the proposed class members' claims. Plaintiff's interests do not conflict with the interests of the other class members that she seeks to represent. Plaintiff has retained counsel competent and experienced in class action litigation and intends to prosecute this action vigorously. Plaintiff's counsel has successfully prosecuted complex actions including consumer protection class actions. Plaintiff and Plaintiff's counsel will fairly and adequately protect the interests of the class members.

26       45.     **Superiority**: The class action device is superior to other available means for  
27 the fair and efficient adjudication of the claims of Plaintiff and the proposed class members.

1 The relief sought per individual member of the class is small given the burden and expense of  
 2 individual prosecution of the potentially extensive litigation necessitated by the conduct of  
 3 defendants. Furthermore, it would be virtually impossible for the class members to seek  
 4 redress on an individual basis. Even if the class members themselves could afford such  
 individual litigation, the court system could not.

5       46. Individual litigation of the legal and factual issues raised by the conduct of  
 6 defendant would increase delay and expense to all parties and to the court system. The class  
 7 action device presents far fewer management difficulties and provides the benefits of a  
 8 single, uniform adjudication, economies of scale and comprehensive supervision by a single  
 9 court.

10      47. Given the similar nature of the class members' claims and the absence of  
 11 material differences in the state statutes and common laws upon which the class members'  
 12 claims are based, a nationwide class will be easily managed by the Court and the parties.

13      48. The court may be requested to also incorporate subclasses of Plaintiffs,  
 14 defendants, or both, in the interest of justice and judicial economy.

15      49. In the alternative, the class may be certified because:

- 16           a. the prosecution of separate actions by the individual members of the  
                 class would create a risk of inconsistent or varying adjudication with  
                 respect to individual class members which would establish  
                 incompatible standards of conduct by defendant;
- 17           b. the prosecution of separate actions by individual class members  
                 would create a risk of adjudications with respect to them which  
                 would, as a practical matter, be dispositive of the interests of other  
                 class members not parties to the adjudications, or substantially  
                 impair or impede their ability to protect their interests; and
- 18           c. defendant has acted or refused to act on grounds generally applicable  
                 to the class, thereby making appropriate final and injunctive relief  
                 with respect to the members of the class as a whole.

**FIRST CAUSE OF ACTION**  
**(California Computer Crime Law**  
**Cal. Pen. Code § 502)**

4        50. Abrams incorporates by reference the foregoing allegations.  
5        51. The cellular phones used and owned by Abrams and the other class members  
6 are sophisticated electronic devices which are programmable and capable of being used in  
7 conjunction with external files, and contain many (if not most) of the same capabilities and  
8 equipment as traditional desktop computers (as well as cellular radio signal processing  
9 technology). These cellular phones are computer systems under the definition of Cal. Pen.  
10 Code § 502(b)(5).

11        52. The delivery of SMS messages to cellular phones is performed according to  
12 industry standards (specifically, the Short Message Service standard). The technical protocols  
13 of these standards requires that transmission of mobile content to a cellular phone (and the  
14 subsequent billing of that account) is not complete until the cellular phone transmits a  
15 confirmation signal. Thus, the unauthorized charges to recycled phone numbers attributable  
16 to Facebook Mobile require interactivity and access to the cellular phones of Plaintiff and the  
17 other class members. SMS messages contain brief communications from other SMS users,  
18 and are data under the definition of Cal. Pen. Code § 502(b)(6).

19       53. The receipt of SMS messages to cellular phones consumes computer services  
20 as defined by Cal. Pen. Code § 502(b)(4), including computer time, data processing, and  
21 storage capacity. Moreover, Abrams and the other class members frequently must pay for the  
22 receipt of SMS messages, whether those messages are authorized or not. If the unauthorized  
23 charges to recycled phone numbers attributable to Facebook Mobile are not eventually paid,  
24 Verizon Wireless (and any other cellular carrier) would discontinue all services (including  
25 cellular service) to the affected cellular accounts.

54. Through the conduct alleged above, Defendant is involved in the transmission of SMS messages to the cellular phones of Plaintiff and the other class members. Through his conduct, Defendant violates Cal. Pen. Code § 502(c)(3) by knowingly and without permission using or causing to be used computer services and violates Cal. Pen. Code § 502(c)(4) by knowingly accessing the cellular phones of Plaintiff and the class members and without permission adds data to those phones.

55. Plaintiff and the other class members own the cellular phones affected by Defendant's violation of Cal. Pen. Code § 502 and are damaged by those violations. If the unauthorized charges to recycled phone numbers attributable to Facebook Mobile are not eventually paid, cellular carriers will discontinue all services (including cellular service) to the affected cellular telephone accounts. Thus, these charges require class members to pay more to their cellular carrier to maintain their cellular service.

56. Plaintiff, on her own behalf and behalf of the other class members, seeks compensatory damages in an amount to be determined at trial and injunctive relief or other equitable relief (including an accounting, and disgorgement of fees obtained while these violations were ongoing), as well as reasonable attorney's fees, against Defendant under Cal. Pen. Code § 502(e).

## **SECOND CAUSE OF ACTION**

(Violation of California’s Unfair Competition Law (“UCL”),

**Cal. Bus. & Prof. Code § 17200)**

57. Abrams incorporates by reference the foregoing allegations.

58. Defendant's communications to the cellular carriers falsely state that Plaintiff and the other class members have approved, authorized, and/or consented to charges for mobile content services, and are deceptive and unfair.

59. Further, these communications are unlawful because they violate Cal. Pen. Code § 502(c)(3) and (4).

1       60.     Further, these communications are unlawful because they violate the  
 2 Electronic Funds Transfer Act with respect to pre-paid cellular accounts. Pre-paid cellular  
 3 accounts are credits against future charges through a cellular carrier, are established primarily  
 4 for personal, family, or household purposes. 12 C.F.R. § 205.2(b)(1). Cellular carriers which  
 5 offer pre-paid accounts are “financial institutions” under the EFTA, because they directly or  
 6 indirectly hold an account belonging to the class members. 12 C.F.R. § 205.2(i). The SMS  
 7 messages sent through Facebook Mobile are initiated when Facebook users post messages on  
 8 the Facebook website and are initiated by computer; when the SMS messages are sent, funds  
 9 corresponding to the charges for these SMS messages are transferred from the pre-paid  
 10 cellular accounts. The transfer of these funds is an electronic fund transfer under the  
 11 definition in 12 C.F.R. § 205.3(b). As the electronic fund transfers are set to occur whenever  
 12 Facebook users post messages, they were purportedly authorized to recur at substantially  
 13 regular intervals, and are preauthorized electronic fund transfers under the definition in 12  
 14 C.F.R. § 205.2(k). Facebook violates 15 U.S.C. § 1693e(a) and 12 C.F.R. § 205.2(b) when it  
 15 initiates the transfer of funds through Facebook Mobile without the written authorization of  
 16 Plaintiff and the other class members.

17       61.     The acts alleged above are unlawful, unfair or fraudulent business acts or  
 18 practices and constitute unfair competition under Cal. Bus. & Prof. Code § 17200.

19       62.     These UCL violations have damaged the Plaintiff and other class members by  
 20 causing them to pay falsely inflated cellular service bills to their cellular carriers, as well as  
 21 the lost time required to sort, read, discard and attempt to prevent future charges for  
 22 unwanted mobile content services, and lost storage space, connectivity, and computing  
 23 resources on the cellular phones.

24       63.     Plaintiff, on her own behalf and behalf of the other class members, seeks an  
 25 order enjoining Defendant’s unfair competition alleged herein, and restitution of property  
 26  
 27  
 28

1 gained by such unfair competition under the UCL (Cal. Bus. & Prof. Code § 17203), as well  
 2 as interest and attorney's fees and costs pursuant to, in part, Cal. Code Civ. Proc. § 1021.5.  
 3

#### 4                   **THIRD CAUSE OF ACTION**

##### 5                   **(Unjust Enrichment)**

6         64. Plaintiff incorporates by reference the foregoing allegations.  
 7         65. A benefit has been conferred upon Defendant by Plaintiff and the Class. On  
 8 information and belief, Defendant, directly or indirectly, has received and retains money  
 9 belonging to Plaintiff and the Class resulting from its causing them to be billed for  
 10 unauthorized content charges, and in particular, its practice of systematically, repeatedly and  
 11 without authorization, causing Plaintiff and the Class of wireless handset owners to be billed  
 12 by Defendant's wireless carriers partners for mobile content services authorized to be  
 13 purchased by the previous subscriber assigned such telephone numbers.

14         66. Defendant appreciates or has knowledge of said benefit.

15         67. Under principles of equity and good conscience, Defendant should not be  
 16 permitted to retain the money belonging to Plaintiff and the Class which Defendant has  
 17 unjustly received as a result of its actions.

#### 18                   **FOURTH CAUSE OF ACTION**

##### 19                   **(Trespass to Chattels)**

20         68. Plaintiff incorporates by reference the foregoing allegations.

21         69. At all relevant times, Defendant and/or their agents intentionally and without  
 22 consent, gained access to Plaintiff's wireless handset and the handsets of the class, used  
 23 Plaintiff's wireless handset and the handsets of the class, occupied memory of these handsets,  
 24 and/or dispossessed Plaintiff and the members of class of unencumbered access to their  
 25 wireless handsets.

deprived Plaintiff and the class of their wireless handsets, or a portion thereof.

WHEREFORE, Plaintiff Lindsey Abrams, on behalf of herself and the Class, prays for the following relief:

1. An order certifying the Class as defined above;
  2. An injunction requiring Defendant to cease all unauthorized wireless restraining Defendant from altering, erasing, changing, deleting, destroying oroving or disposing of any documents, records, databases, computer systemsurrently in its possession or control or in the possession or control of its agents which are used or useful in identifying all persons, corporations or otherm Defendant has transmitted its text messages;
  3. An award of actual and/or statutory damages;
  4. Reasonable attorney's fees and costs; and
  5. Such further and other relief the Court deems appropriate.

**JURY DEMAND**

Plaintiff requests trial by jury of all claims that can be so tried.

Respectfully submitted,

Dated: October 22, 2007

By: *[Signature]*  
Alan Himmelfarb  
KAMBEREDELSON, LLC  
One of the Attorneys for Lindsey  
Abrams, individually and on behalf of a  
class of similarly situated individuals

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JAY EDELSON (pro hac vice pending)

## **COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF**

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